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91-531

No. ———

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ADNAN M. KHASHOGGI,
Petitioner,

v.

NATIONAL DEVELOPMENT COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

STEVEN M. BIERMAN *
SIDLEY & AUSTIN
875 Third Avenue
New York, New York 10022
(212) 906-2310

CARTER G. PHILLIPS
MARK D. HOPSON
JOAN ANNE MCCAFFERY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner, Adnan M. Khashoggi

* Counsel of Record

September 26, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Rule 4(d)(1) of the Federal Rules of Civil Procedure, which authorizes service of process by leaving a copy of the summons and complaint at an individual's "dwelling house or usual place of abode," properly may be interpreted to allow service at any temporary or transient residence of an individual, as long as that temporary or transient residence reflects some indicia of permanence.

LIST OF PARTIES

In addition to the parties listed in the caption, the following entities were named as defendants in this action:

Triad Holding Corporation
Triad Financial Establishment
Triad America Corporation
Triad International Marketing
Akorp, N.V.
Ekorp, N.V.
A.K. Holdings, S.A.
A.K. Holdings Ltd.
Triad Foundation
Triad Condas
Edgington Oil Company
Handlingair Ltd.
Uni-Triad Enterprises
John Doe Khashoggi Entities 1-50

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---

PETITION FOR A WRIT OF CERTIORARI

Adnan M. Khashoggi ("Petitioner") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 930 F.2d 253 (2d Cir. 1991). The district court's memorandum opinion and order of June 11, 1990 (App., *infra*, 11a) is reported at 131 F.R.D. 408 (S.D. N.Y. 1990).

JURISDICTION

The opinion of the court of appeals was entered on April 15, 1991. App., *infra*, 1a. Rehearing was denied on May 29, 1991. On August 20, 1991, Justice Marshall extended the time for filing this petition for a writ of certiorari until September 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 4(d)(1) of the Federal Rules of Civil Procedure provides, in relevant part, that

> Service shall be made . . . [u]pon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . .

Fed. R. Civ. P. 4(d)(1).

STATEMENT

At issue in this case is the interpretation of the provision of Rule 4(d)(1) of the Federal Rules of Civil Procedure that permits service upon an individual to be made "by leaving copies [of the summons and complaint] *at the individual's dwelling house or usual place of abode* . . . ." Fed. R. Civ. P. 4(d)(1) (emphasis added). The court of appeals has construed the language emphasized above to require service not at the *single* "dwelling house or usual place of abode" of an individual but at *any* place where the individual to be served was temporarily residing. App., *infra*, 8a.

1. Petitioner is a citizen of Saudi Arabia who resides in Riyadh, Saudi Arabia. App., *infra*, 5a. Petitioner is an international businessman and "frequent intercontinental traveller," *id.* at 7a, who spends time at houses, apartments and hotels in various locations throughout

the world. *Id.* However, petitioner's home in Riyadh is his primary residence and, during the period in question, petitioner spent more time at that home than in any other single location. *Id.* at 17a.

In 1986, respondent National Development Corporation ("NDC") filed suit in the United States District Court for the Southern District of New York to compel petitioner to arbitrate a dispute arising from the dissolution of a joint venture between NDC and Triad Holding Company ("Triad Holding"), which allegedly was controlled by petitioner. App., *infra*, 13a. NDC attempted to serve petitioner on December 22, 1986, by delivering a copy of the summons and complaint to a housekeeper at an Olympic Tower condominium apartment in New York City where petitioner temporarily was staying at that time. *Id.* at 3a.[1] On September 23, 1987, after petitioner failed to appear in the district court action, a default judgment was entered compelling him to arbitrate NDC's claim. *Id.* Petitioner did not appear at the arbitration before the International Chamber of Commerce, and on April 12, 1989, the arbitration tribunal issued a final award holding petitioner jointly and severally liable for

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[1] The apartment—which contained "sleeping quarters, business equipment and facilities and social conveniences suitable for stopover uses of short or longer duration" (app., *infra*, 14a)—was treated by petitioner and his business associates and guests, during visits to New York, like a hotel suite or other facility "for indeterminate stays and occasions." *Id.* at 17a. Such "offices and housing facilities" were maintained by petitioner and his business enterprises "in a dozen or more localities worldwide." *Id.* at 16a-17a.

The Olympic Towers apartment was owned by Akorp, N.V., a wholly-owned subsidiary of A.K. Holdings, Ltd., which is in turn wholly-owned by petitioner. *Id.* at 13a. In 1986, petitioner visited this apartment seven different times for a total of 34 days. *Id.* at 14a, 17a. His longest stays in the apartment were for two separate eight-day periods. *Id.* at 17a. During these 1986 visits, petitioner entered the United States on a visitor's visa on a temporary basis. Joint Appendix, *NDC* v. *Triad Holding Corp.*, No. 90-7906 (2d Cir. 1991) ("C.A. App."), at A472, A560-A571.

$3.4 million, plus costs, interest and attorneys fees. *Id.* at 4a.[2]

NDC returned to district court and filed a "supplemental complaint" to confirm the arbitration award. *Id.* NDC attempted to serve the supplemental complaint upon petitioner by mailing a copy to him at the Olympic Tower apartment and by mailing a copy to an attorney who represented petitioner in an unrelated matter. *Id.* In August 1989, after petitioner failed to appear in the district court, a default judgment against him was entered in the amount of $4.6 million, confirming the arbitration award. *Id.*; at 14a. Shortly thereafter, in August 1989, NDC personally served petitioner with post-judgment discovery requests. *Id.* at 4a.

2. On October 25, 1989, petitioner filed a motion pursuant to Fed. R. Civ. P. 60(b)(4) to vacate on the ground of improper service concerning both the 1987 judgment compelling him to arbitrate and the 1989 default judgment confirming the arbitration award. App., *infra*, 4a. Petitioner argued that both judgments were void because personal jurisdiction was lacking in each instance due to respondent's failure to comply with the requirements of Fed. R. Civ. P. 4(d)(1) for service of the summons and complaint. App., *infra*, 15a.

With respect to the "supplemental complaint," which resulted in the 1989 default judgment, the district court found that "NDC merely mailed copies of the Supplemental Complaint . . . to [petitioner] at the Olympic Tower apartment and to . . . an attorney who had not appeared" in this action. App., *infra*, 21a. According to the court, "[n]o copy was mailed to [petitioner] to his home in Saudi Arabia" (*id.*) and "[n]o attempt was made to

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[2] Triad Holding also was found jointly and severally liable for the arbitration award. App., *infra*, 4a. Triad Holding, a co-defendant in the suit to compel arbitration, had been served in the district court action pursuant to letters rogatory by Swiss judicial authorities. *Id.* at 13a.

comply with . . . Rule [4(c)(2)(C)(ii)]" governing provisional service by mail. *Id.* The court noted that "[w]hile a liberal approach should be taken to what constitutes compliance with the requirements of the federal statute, where plaintiffs have completely disregarded the mandates of the Rules it would be inappropriate to validate the attempt [at service] made here." *Id.* at 22a. Thus, the court concluded that the "money judgment obtained by default was improperly procured and is void and is vacated . . . ." *Id.* at 23a.

With respect to the 1987 default judgment compelling petitioner to arbitrate, the court stated that "the threshold question to be answered is whether the Olympic Tower apartment" constituted petitioner's "dwelling house" or "usual place of abode." App., *infra*, 16a. On the record before it, the court found that petitioner's

> infrequent and occasional use of the apartment would not seem to make it his "dwelling house," "dwelling place," or "usual place of abode."

Id. at 17a.[3] "'[T]he cases make clear that it is not enough to leave a summons at a house that defendant owns or occupies from time to time. The house must be his usual and normal residence.'" *Id.* at 18a (*quoting Shore* v. *Cornell-Dublier Elec. Corp.*, 33 F.R.D. 5, 7 (D. Mass. 1963)). Thus, service on petitioner at the Olympic Towers apartment "may not have literally complied with Rule 4(d)(1)." *Id.* at 19a.

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[3] The New York statute for service of process has a provision that is virtually identical to Rule 4(d)(1) of the Federal Rules, except that the term "dwelling *place* or usual place of abode" is substituted in the New York statute for the phrase "dwelling *house* or usual place of abode" in the Federal Rule. See N.Y. Civ. P. Law & R. § 308(2) (McKinney 1988). The district court interchangeably used the alternative language—"dwelling place" or "dwelling house"—in addressing this issue. See *id.* at 16a-17a. The court of appeals, however, focused solely on the validity of service under the Federal Rule. See *id.* at 19a.

Nevertheless, the court stated that this finding "does not end our analysis of the attempted service." *Id.* Instead, the court held that Rule 4 "should be liberally construed in the interest of doing substantial justice." *Id.* (quotations omitted). In this case, the court found evidence that petitioner had received "both personal and business mail" at Olympic Towers, and that an employee of petitioner generally "would pay any bills and forward the mail on to Switzerland or Saudi Arabia." *Id.* at 20a. In the circumstances, the court held that such proof "succeeded in furnishing, even if just barely, sufficient evidence of service of process and implications of notice thereof to [petitioner] through a regular set-up." *Id.* Because "the evidence shows conduct calculated to give actual notice to [petitioner]," *id.* at 19a, the failure to comply with Rule 4(d)(1) was excused, and the motion to vacate the 1987 default judgment was denied. *Id.* at 22a.

3. Petitioner appealed, arguing that the 1987 default judgment compelling arbitration should have been vacated because the attempted service of the summons and complaint was invalid under Fed. R. Civ. P. 4(d)(1). App., *infra*, 4a. Petitioner argued that the district court's finding that the Olympic Tower apartment was not petitioner's "dwelling house" or "usual place of abode"—and that service therefore did not "literally" comply with Rule 4(d)(1)—was dispositive. *Id.* at 17a-19a. According to petitioner, further inquiry relating to the issue whether petitioner likely received actual notice was irrelevant, as a matter of law.

The Second Circuit affirmed the order of the district court, but declined to adopt that court's rationale and specifically "reject[ed] the notion that 'actual notice' suffices to cure a void service." App., *infra*, 6a. Instead, the court of appeals upheld the validity of respondent's service of the summons and complaint based on its interpretation of Rule 4(d)(1) to allow for "two or more

'dwelling houses or usual places of abode' provided each contains sufficient indicia of permanence." *Id.* at 8a.[4]

The court of appeals noted that the "quaint" and "archaic" terms, "dwelling house or usual place of abode," "survive only in religious hymns, romatic sonnets and unhappily, in jurisdictional statutes." App., *infra*, 7a. Despite the "archaic" nature of the language, the court stated that it would "decide this case" in light of "a recognition of the realities of life in this the winter of the twentieth century," including "a highly mobile and affluent society." *Id.*

The court reasoned that it would be "unrealistic to interpret Rule 4(d)(1) so that the person to be served has only one dwelling house or usual place of abode." *Id.* at 7a. Therefore, the court interpreted the operative language of the statute—which clearly refers to a single "place of abode"—as if it recognized multiple "place[s] of abode," as long as each "place" "contains sufficient indicia of permanence." *Id.* at 7a-8a. Because the court found that the Olympic Tower apartment had "sufficient indicia of permanence" and because petitioner was actually staying at the apartment at the time of service, however briefly and temporarily, the court held that the service of the 1986 complaint was consistent with the Rule. *Id.* at 9a-10a.

The court of appeals acknowledged that there were "decades of conflicting authority" on the construction of Rule 4(d)(1). *Id.* at 7a. Indeed, the panel specifically pointed to precedents in the Tenth Circuit and District of Massachusetts that squarely conflicted with its own interpretation of the Rule. See *Id.* at 8a-9a (citing *First*

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[4] The court did not hold that the district court's factual findings were clearly erroneous. See app., *infra*, 6a-7a. Accordingly, the district's court finding that, to the extent petitioner has a *single* "dwelling house" or "usual place of abode," that place is not the Olympic Tower apartment must be accepted as correct. See *Id.* at 17a-18a.

Nat'l Bank & Trust Co. v. *Ingerton*, 207 F.2d 793 (10th Cir. 1953); *Shore* v. *Cornell-Dubilier Elec. Corp.*, 33 F.R.D. 5 (D. Mass. 1963)). Nevertheless, the court concluded that the "application of [its] rule [regarding the interpretation of Fed. R. Civ. P. 4(d)(1)] to uphold service is appropriate under these facts" and the petitioner's motion "to vacate the default judgment . . . for want of personal jurisdiction was properly denied." App., *infra*, 9a-10a.

REASONS FOR GRANTING THE PETITION

The decision below creates an acknowledged conflict between the circuits on the interpretation of Fed. R. Civ. P. 4(d)(1). See, *e.g.*, *First Nat'l Bank & Trust Co.* v. *Ingerton*, 207 F.2d 793, 794-95 (10th Cir. 1953). Moreover, by virtually ignoring the plain language of the Rule and adopting a liberal construction of its requirements designed to serve the court's perception of sound policy, the decision below is inconsistent in principle with decisions of this Court and other courts that consistently have mandated a strict construction of the service requirements of the Federal Rules of Civil Procedure. See, *e.g.*, *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 110 (1987); *Mid-Continent Wood Prods., Inc.* v. *Harris*, 936 F.2d 297, 300 (7th Cir. 1991) (*quoting United States* v. *Mollenhauer Lab., Inc.*, 267 F.2d 260, 262 (7th Cir. 1959)). The existence of a "highly mobile and affluent society," which persuaded the court below to disregard the plain meaning of Rule 4(d)(1), app., *infra* 7a (quoting 4A C. Wright & A. Miller, Federal Practice and Procedure § 1906, at 79-80 (2d ed. 1987), makes the conflict in the interpretation of that Rule a recurring and important question that warrants this Court's review. Accordingly, the Court should grant certiorari to resolve the conflict.

1. The decision of the Second Circuit in this case squarely conflicts with the holding of the Tenth Circuit

in *First Nat'l Bank & Trust Co.* v. *Ingerton*, 207 F.2d 793, 794-95 (10th Cir. 1953). In that case, the defendant Ingerton and her husband "maintain[ed their] residence" at the El Portal Hotel in Raton, New Mexico during the time when service of process was attempted. 207 F.2d at 794. "Because of their business," the defendant and her husband "led a transitory life and were absent much of the time, but when they were not [travelling on business,] they lived at the El Portal Hotel." *Id.* at 795.

The plaintiffs in *Ingerton* attempted to serve the defendant, pursuant to Rule 4(d)(1), by leaving a copy of the summons and complaint with defendant's son at a house in Denver. The Denver house had been rented by defendant's husband for the primary use of defendant's son-in-law and daughter. *Id.* at 794. Although the house was not the permanent residence of defendant, the court found that "[defendant] and her husband occupied the house at times and visited with their . . . daughter and son-in-law." At the time that the summons and complaint were served, defendant was visiting her daughter in Denver, although she was not physically present in the house. *Id.* at 794.

According to the Tenth Circuit, the "correctness" of the service of process "depends upon whether the designated address was [defendant's] 'usual place of abode' at the time of such service." *Id.* at 794. Focusing on the operative language—*i.e.*, "dwelling house or usual place of abode"—the court noted that all of the "federal cases that have construed this provision" (in both federal and state statutes) had agreed "in principle" on the meaning of this language. In particular, the cases "all recognize that the word 'usual' has significance and must be given consideration in determining the validity of such service." *Id.* at 794 (citing, *e.g.*, *Earle* v. *McVeigh*, 91 U.S. 503 (1875); *McFadden* v. *Shore*, 60 F.Supp. 8, 9 (E.D. Pa. 1945)).[5]

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[5] The language "dwelling house or usual place of abode" is taken directly from former Equity Rule 13. 2 Moore's Federal Practice

Thus, the Tenth Circuit held—contrary to the holding below—that "where temporary residence is established away from the normal or usual residence, the 'place of abode' is the usual residence regardless of the fact that defendant may be occupying the temporary residence at the time of service." *Id.* at 795 (quoting *McFadden* v. *Shore*). Because defendant's "principal place of abode" was at the El Portal Hotel and because defendant did not "relinquish [her] residence at the El Portal Hotel," her "temporary arrangement in Denver" (*id.* at 794) did not constitute a "dwelling house or usual place of abode." *Id.* at 796 (Murrah, dissenting). Accordingly, the Tenth Circuit affirmed the judgment quashing the attempted service under Rule 4(d)(1). *Id.* at 795.[6]

¶ 4.11 (2d ed. 1991). The authors of Equity Rule 13 viewed "dwelling house or usual place of abode" as a synonym for "home". *Hannah* v. *United States Lines Co.*, 151 F. Supp. 122, 123 (S.D.N.Y. 1957) (citing Proceedings of the Washington Institute on Federal Rules of the American Bar Association, October 1938, 187, Remarks of Robert G. Dodge, Esq., a member of the Supreme Court Advisory Committee). See also *In re Daboul*, 82 B.R. 657, 660 (Bankr. D. Mass. 1987) (individual must consider place of service "home" at the time of service); *United States* v. *Mensik*, 57 F.R.D. 125, 127 (M.D. Pa. 1972) ("Courts interpreting these words have focused on their literal meaning, so that usual place of abode is taken to mean the permanent residence of the party").

[6] As the Second Circuit recognized, see App., *infra* 8a-9a, there is substantial support for the Tenth Circuit's interpretation of Rule 4(d)(1) in a number of lower court decisions that have construed the Rule to permit service only at the *single* "usual place of abode" of a transitory defendant. *McFadden* v. *Shore*, 60 F. Supp. 8, 9 (E.D. Pa. 1945) ("the weight of authority hold[s] that where temporary residence is established away from the normal or usual residence the place of abode is the usual residence regardless of the fact that defendant may be occupying the temporary residence at the time of service") (*citing Rovinski* v. *Rowe*, 131 F.2d 687 (6th Cir. 1942); *In re Daboul*, 82 B.R. 657, 660 (Bankr. D. Mass. 1988) (mere ownership or occasional occupancy insufficient for service under Rule 4(d)(1)); *Mensik*, 57 F.R.D. at 127; *Hannah* v. *United States Lines Co.*, 151 F. Supp. 122, 123 (S.D.N.Y. 1957); *Bohland* v. *Smith*, 7 F.R.D. 364, 365 (E.D. Ill. 1947); see also *Berner*

The irreconcilable conflict between the Tenth Circuit's decision in *Ingerton* and that of the court below is highlighted by Judge Murrah's dissenting opinion in the *Ingerton* case. Judge Murrah—like the Second Circuit—concluded that a person's "usual place of abode" is not necessarily his permanent residence. He conceded that the Denver house—like petitioner's New York apartment—"very clearly . . . may have been a temporary residing place of [defendant] at the time this service was attempted . . . but was not [defendant's] dwelling house or permanent place of abode." *Id.* at 796. Because defendant Ingerton (like petitioner) travelled extensively, the dissent argued that Ingerton's "usual place of abode" was wherever she was temporarily residing at the time of service. *Id.*; see *id.* at 795 ("the usual place of abode is where a person is living at the particular time service is made"). Of course, the position adopted in Judge Murrah's dissent (and in the decision below)—that a person may have more than one "usual place of abode" for purposes of service of process—has been squarely rejected by the Tenth Circuit. *Id.*; see *Rosa* v. *Cantrell*, 705 F.2d 1208, 1214 (10th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983); see also *James* v. *Russell F. Davis, Inc.*, 163 F. Supp. 253, 256-57 (N.D. Ind. 1958) (following *Ingerton*); *Rask* v. *American Fed'n of Labor*, 116 N.W.2d 175, 178 (Minn. 1962) (following *Ingerton* for proposition that "the place where one is temporarily residing is not his *usual* place of abode") (emphasis in original).

In sum, the holding below—that Rule 4(d)(1) allows service at multiple "dwelling house[s] or usual place[s]

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v. *Farny*, 11 F.R.D. 506 (D.N.J. 1951) (service at home owned by defendant in New Jersey, where defendant registered to vote and listed as resident, invalid under Rule 4(d)(1), where defendant actually lived and maintained "usual place of abode" in New York); *James* v. *Russell F. Davis, Inc.*, 163 F. Supp. 253, 256-57 (N.D. Ind. 1958) (where serviceman had established his own home and resided with parents for short leave periods, parents' home was not ("dwelling house or usual place of abode as contemplated by Rule 4(d)(1)").

of abode," as long as each "place" "contains sufficient indicia of permanence" (App., *infra* 8a-9a)—simply cannot be squared with the Tenth Circuit's holding that the Rule refers only to a person's permanent residence, "regardless of the fact that defendant may be occupying [a] temporary residence at the time of service." *Ingerton*, 207 F.2d at 795. The Court should grant certiorari to resolve this square conflict on the interpretation of Rule 4(d)(1) of the Federal Rules of Civil Procedure.

2. The creation, in the decision below, of an acknowledged conflict in the interpretation of Rule 4(d)(1) reflects a broader circuit conflict concerning the principles of interpretation applicable to the provisions for service of process in the Federal Rules of Civil Procedure. As the decision below makes clear, the court of appeals was drawing upon a settled approach within that Circuit of eschewing reliance upon the plain meaning of Rule 4 in favor of an interpretation that serves that court's view of policy and fairness considerations. App., *infra*, 6a-9a. Review of this decision thus provides the Court with a suitable vehicle for resolving the basic jurisprudential conflict among the circuits concerning the proper approach to employ in interpreting Rule 4's requirements.

Contrary to the Second Circuit's approach, virtually every court of appeals to address the issue has held that strict compliance with the plain requirements of Rule 4 of the Federal Rules of Civil Procedure is necessary to achieve effective service of process. "[A] liberal construction of the rules of service of process 'cannot be utilized as a substitute for the plain legal requirement as to the manner in which service of process may be had.'" *Mid-Continent Wood Prods., Inc.*, 936 F.2d at 300 (*quoting United States* v. *Mollenhauer Lab., Inc.*, 267 F.2d 260, 262 (7th Cir. 1959)); see *Combs* v. *Nick Garin Trucking*, 825 F.2d 437, 446 (D.C. Cir. 1987) (same); *Armco, Inc.* v. *Penrod-Stauffer Bldg. Sys., Inc.*, 733 F.2d 1087, 1089 (4th Cir. 1984) (invalidating service of process not in

strict compliance with Rules because "plain requirements for the means of effecting service of process may not be ignored"); *Way* v. *Mueller Brass Co.*, 840 F.2d 303, 306 (5th Cir. 1988) (invalidating service of process and "declin[ing] to twist the plain words of the statute").

This conflict in approach clearly is illustrated by decisions from the First, Third, Sixth and D.C Circuits, refusing to uphold service by mail where there was noncompliance with the plain language of Rule 4. *Media Duplication Servs., Ltd.* v. *HDG Software, Inc.*, 928 F.2d 1228, 1235 (1st Cir. 1991) (invalidating service of process where plaintiff did not comply with the "clear language of the Rule"); *Combs*, 825 F.2d at 446 (ineffective service of process where the plaintiff failed to follow the plain language of Rule 4(c)(2)(C)(ii)); *Stranahan Gear Co., Inc.* v. *NL Indus., Inc.*, 800 F.2d 53, 56-57 (3d Cir. 1986) (invalidating service of process where plaintiff did not strictly comply with Rule 4(c)(2)(C)(ii)); *Friedman* v. *Estate of Presser*, 929 F.2d 1151, 1155 (6th Cir. 1991) (reversing district court's decision excusing "defective" service under Federal Rule of Civil Procedure 4(c)(2)(C)(ii)).[7]

Each of these decisions notes that the Second Circuit in *Morse* v. *Elmira Country Club*, upheld service, reasoning that "factors of justice and equity push toward reading" the Federal Rules to approve service, even where there is not strict compliance with the requirements of Rule 4(c)(2)(C)(ii). 752 F.2d 35, 40 (2d Cir. 1984); see *Media Duplication Servs., Ltd.*, 928 F.2d at 1233 (discussing Second Circuit decision in *Morse*); *Friedman*,

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[7] *See also Schnabel* v. *Wells*, 922 F.2d 726, 727-28 (11th Cir. 1991); *McDonald* v. *United States*, 898 F.2d 466, 468 (5th Cir. 1990); *Gulley* v. *Mayo Found.*, 886 F.2d 161, 165 (8th Cir. 1989); *S.J. Groves & Sons Co.* v. *J.A. Montgomery, Inc.*, 866 F.2d 101, 102 (4th Cir. 1989); *Geiger* v. *Allen*, 850 F.2d 330, 332 n.3 (7th Cir. 1988); *Green* v. *Humphrey Elevator & Truck Co.*, 816 F.2d 877, 879-83 (3d Cir. 1987).

929 F.2d at 1155 (same); *Combs*, 825 F.2d at 445-47 (same); *Stranahan*, 800 F.2d at 57 (same).

The Third Circuit, for example, expressly rejected the approach to the interpretation of the service provisions of the Federal Rules adopted by the Second Circuit:

> That interpretation is at odds with the express provisions of Rule 4. We do not believe that "factors of justice and equity" can override the unambiguous terms of a specific service rule. We believe that the court [*i.e.*, the Second Circuit] lacked the authority to counteract the specific direction of Congress and the Advisory Committee of the Rules of Civil Procedure.

Stranahan, 800 F.2d at 57 (citations omitted); see *id.* at 56 ("in drafting Rule 4, Congress meant precisely what its clear language states and . . . mail service is effective only if the provisions of Rule 4(c)(2)(C)(ii) are complied with literally"); *Friedman*, 929 F.2d at 1155 n.5 ("[i]n running against the majority rule, the Second Circuit" relied upon "factors of justice and equity. . . . [d]espite clear legislative intent to the contrary"); *Media Duplication Servs., Ltd.*, 928 F.2d at 1235 ("the service rules were established to provide bright lines and avoid entangling the courts in ad hoc determinations about whether and to what degree actual notice of a lawsuit was provided. If these rules are to be modified, it must be through the authorized rule-making procedure"); *Combs*, 825 F.2d at 446-47 (declining to follow the Second Circuit based on the legislative history and the "plain language of Rule 4(c)(2)(C)(ii)").

In sum, the decision below—in which the Second Circuit ignored the "archaic" language of the Federal Rule in order to better serve the court's own perception of the modern "realities of life" (app., *infra*, 7a)—reflects a deeper conflict between a "liberal construction of the rules of service of process" (*Mid-Continent Wood Prods., Inc.*,

936 F.2d at 300) followed by the Second Circuit and the contrary view that policy considerations and the likelihood of actual notice to the defendant cannot substitute for the "plain legal requirement" of the Rules. *See id.*; *Friedman*, 929 F.2d at 1155. This broader conflict is squarely presented by this case, and accordingly, review by this Court of the decision below is particularly appropriate.

3. The decision below also conflicts in principle with this Court's decision in *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97 (1987), which held it to be "unwise for a court to make its own rule authorizing service of process." *Id.* at 109. Indeed, the Court noted that it was "unclear at this time" whether a federal court *could* "fashion a rule authorizing service of process" (*id.* at 108) because the weight of authority "considers statutory authorization necessary to a federal court's service of summons." *Id.* at 109-10. Even if the federal courts were empowered to make their own service rules, "[i]t seems likely that Congress has been acting on the assumption that federal courts cannot add to the scope of service of summons Congress has authorized." *Id.* at 109.

That congressional assumption "argue[s] strongly" against permitting service of process except in strict compliance with the terms of the Rules for two reasons. *Id.* at 110. First, "since Congress concededly has the power to limit service of process, circumspection is called for in going beyond what Congress has authorized." *Id.* Second, because statutes and the Federal Rules provide the measure of adequate service of process, "courts are inappropriate forums for deciding whether to extend them." *Id.*

In the decision below, the Second Circuit discarded the language of the congressional authorization as "quaint" and "archaic," in order to "decid[e] this case . . . with a recognition of the realities of life in this the winter of the twentieth century." App., *infra*, 7a. That is precisely the type of "common law" decisionmaking that this Court

decried in *Omni Capital*. 484 U.S. at 108. Whether the Second Circuit's view of the "realities of life" is more accurate than the view of the drafters of the Federal Rules is at least debatable given the needless uncertainty the court of appeals' approach creates. In the end, the question of who has the "better" view is irrelevant because, as this Court made clear in *Omni Capital*, "courts are inappropriate forums" for making such decisions. 484 U.S. at 110.

Finally, the question presented involves an issue of substantial doctrinal importance: as the Seventh Circuit correctly recognizes, the requirement of proper service of process is "not some mindless technicality." *Del Raine* v. *Carlson*, 826 F.2d 698, 704 (7th Cir. 1987). "The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause." *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Service of the summons and complaint "is the procedure by which a court having venue and jurisdiction of the subject matter of a suit asserts jurisdiction over the person of the party served." *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438, 444-45 (1946). "[B]efore a court may exercise personal jurisdiction over a defendant, there must be *more than* notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum." *Omni Capital*, 484 U.S. at 104 (emphasis added). Absent consent, "there must be authorization for service of summons on the defendant." *Id.*; *see also Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F.2d 406, 414 (9th Cir. 1977) (court's exercise of *in personam* jurisdiction must be "affirmatively authorized by the legislature").

The question presented also has substantial practical importance: litigants and the public at large are entitled to *certainty* as to the authorized means for service of process. Indeed, because service in compliance with the Federal Rules is binding on a defendant—even if the de-

fendant lacks actual notice of the suit, *see, e.g., NLRB* v. *Clark*, 468 F.2d 459, 464 (5th Cir. 1972)—it is imperative that the requirements for constructive service under Rule 4(d)(1) be definite. This Court should grant certiorari to ensure that the rules for service of process under Rule 4 do not vary depending on whether service is attempted in New York or Denver or Chicago.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN M. BIERMAN *
SIDLEY & AUSTIN
875 Third Avenue
New York, New York 10022
(212) 906-2310

CARTER G. PHILLIPS
MARK D. HOPSON
JOAN ANNE MCCAFFERY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner,
Adnan M. Khashoggi

September 26, 1991

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 1163, Docket 90-7906

NATIONAL DEVELOPMENT COMPANY,
Plaintiff-Appellee,

v.

TRIAD HOLDING CORPORATION; ADNAN KHASHOGGI; TRIAD FINANCIAL ESTABLISHMENT; TRIAD AMERICA CORPORATION; TRIAD INTERNATIONAL MARKETING; AKORP, N.V.; EKORP, N.V.; A.K. HOLDINGS, S.A.; A.K. HOLDINGS LTD.; TRIAD FOUNDATION; TRIAD CONDAS; EDGINGTON OIL COMPANY; HANDLINGAIR, LTD.; UNI-TRIAD ENTERPRISES; JOHN DOE KHASHOGGI ENTITIES 1-50,
Defendants,

ADNAN KHASHOGGI,
Defendant-Appellant.

Argued March 5, 1991

Decided April 15, 1991

Before KEARSE, PRATT and McLAUGHLIN, Circuit Judges.

McLAUGHLIN, Circuit Judge:

For more than a half-century, the Federal Rules of Civil Procedure have permitted service upon an individual by leaving a summons and complaint "at the individual's

dwelling house or usual place of abode." For a half-century before that, Equity Rule 13 had the same provision. With approximately 1.16 billion passengers annually engaging in international airline travel, *see* Washington Times, Jan. 1, 1991, at C1 col. 1, and an estimated five million people with second homes in the United States, *see* Stern, *Steal This House*, Forbes, Oct. 1, 1990, at 81, determining a person's "dwelling house or usual place of abode" is no longer as easy as in those early days of yesteryear.

We ponder this problem upon review of an order of the United States District Court for the Southern District of New York (Milton Pollack, *District Judge*,) refusing, under Fed.R.Civ.P. 60(b)(4), to vacate a default judgment entered against defendant-appellant Adnan Khashoggi ("Khashoggi"). In essence, Khashoggi argues that, although he has numerous residences world-wide, his "dwelling house or usual place of abode" is in Saudi Arabia and, absent personal delivery, service of process pursuant to Rule 4(d)(1) is proper only at his compound there. Therefore, he concludes that a purported service at his apartment at the Olympic Tower in New York was void and conferred no jurisdiction. We disagree and affirm the order of the district court.

BACKGROUND

Plaintiff-appellee National Development Company ("NDC") is a corporation wholly-owned by the Republic of the Philippines. The dispute between NDC and Khashoggi arose from the dissolution of Triad Asia, Ltd. ("Triad Asia"), a joint venture formed by NDC and Triad Holding Corporation ("Triad Holding"), a company controlled by Khashoggi. NDC claims that Khashoggi converted approximately $3.5 million of Triad Asia's assets that should have been distributed to NDC when the joint venture was dissolved.

On August 25, 1986, pursuant to an arbitration clause in a Memorandum of Agreement between NDC and Triad Holding, NDC delivered a Request for Arbitration to the International Chamber of Commerce ("ICC") and sent a copy of the request, along with a Notice of Commencement of Arbitration, by registered or certified mail to each of the defendants, including Khashoggi. The Memorandum of Agreement provided that "any dispute or difference between the parties" concerning the joint venture be "finally settled under the Rules of Conciliation and Arbitration of the [ICC]." Return mail receipts were received from each of the defendants including Khashoggi. The ICC subsequently sent copies of the Request for Arbitration to the defendants on two occasions and received return mail receipts from each defendant, including Khashoggi, for both mailings. Neither Khashoggi nor any of the other defendants responded. NDC then commenced this action seeking to compel Khashoggi to arbitrate.

It is the service of the summons and complaint on Khashoggi on December 22, 1986 that forms the basis of this appeal. On that day, NDC handed a copy of the summons and complaint to Aurora DaSilva, a housekeeper at Khashoggi's Olmpic Tower condominium apartment on Fifth Avenue. Service on Triad Holding, which was not disputed, was effected pursuant to letters rogatory by Swiss judicial authorities. On September 23, 1987, after Khashoggi failed to appear in the district court action, a default judgment was entered compelling him to arbitrate NDC's claim.

The ICC arbitration was commenced and a hearing was held on February 16, 1989 without an appearance from any of the defendants. Robert G. Morvillo, Khashoggi's criminal counsel in an unrelated matter, *United States v. Marcos*, 87 Crim. 598 (JFK), however, sent a letter dated February 22, 1989 to the Chairman of the

ICC tribunal, informing him that "[b]ecause of [the pending criminal matter], we think it would be inadvisable for Mr. Khashoggi to appear in [the arbitration]."

On April 12, 1989, the ICC tribunal issued a final award finding that Triad Holding was Khashoggi's alter ego and finding Triad Holding and Khashoggi jointly and severally liable to NDC in an amount over $3.4 million plus costs, interest and attorneys' fees.

NDC thereupon returned to the district court and received leave to file a "supplemental complaint" to confirm the award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.* NDC served the supplemental complaint upon Khashoggi by mailing a copy to him at his Olympic Tower apartment and a copy to Mr. Morvillo. On August 4, 1989, after Khashoggi again failed to appear, a default judgment was entered confirming the arbitration award. NDC then took steps to enforce the judgment, including serving Khashoggi personally in August 1989 with post-judgment discovery requests.

On October 25, 1989, Khashoggi filed a motion pursuant to Fed.R.Civ.P. 60(b)(4) to vacate both the 1987 default judgment compelling him to arbitrate and the 1989 default judgment confirming the ICC arbitration award. Khashoggi complains that both default judgments are void for lack of personal jurisdiction inasmuch as the summons, complaint and supplemental complaint were improperly served upon him. Taking a belt and suspenders approach, NDC immediately commenced a second action in the district court to confirm the award.

The district court held an evidentiary hearing on the service of process issue, at which Khashoggi and his housekeeper, Ms. DaSilva, testified. Ms. DaSilva confirmed that Khashoggi was in New York and staying at his Olympic Tower apartment from December 15 through

December 23, 1986. The parties stipulated that Ms. DaSilva accepted delivery of a copy of the summons and complaint on December 22, 1986. Ms. DaSilva testified that during 1986, Khashoggi stayed at his Olympic Tower apartment for a total of 34 days.

To call it an apartment is perhaps to denigrate it. Valued at approximately $20-25 million, containing more than 23,000 square feet on at least two floors, the Olympic Tower apartment contains a swimming pool, a sauna, an office and four separate furnished "apartments" to accommodate guests and Khashoggi's brother. The complex requires the attention of two full-time and three part-time staff persons.

Khashoggi testified that he is a citizen of Saudi Arabia and resides in a ten-acre, six-villa compound in its capital city, Riyadh. In 1986, Khashoggi stayed in the Riyadh compound for only three months. During the remaining nine months, Khashoggi travelled throughout the world, staying another two months at a "home" in Marabella, Spain. Khashoggi testified that he purchased the Olympic Tower apartment in 1974. Shortly thereafter, Khashoggi transferred ownership to Akorp, N.V., a company that is wholly owned by A.K. Holdings, Ltd., which, in turn, is wholly owned by Khashoggi. Before Khashoggi transferred ownership of the Olympic Tower apartment to Akorp, he personally hired contractors to complete a remodeling project costing over $1 million. The results of the remodeling project were prominently featured in the June 1984 issue of *House and Garden*.

With regard to the NDC lawsuit, Khashoggi testified that he first learned of it in 1989, when NDC personally served him with its post-judgment discovery requests.[1] Khashoggi was in New York at that time, following ex-

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[1] The Morvillo letter of February 22, 1989 casts a pall over Khashoggi's lament that he never heard of the NDC arbitration until August 1989.

tradition from Switzerland, to face unrelated criminal charges, for which Mr. Morvillo was his counsel. Khashoggi claimed, however, that Mr. Morvillo was never retained to represent him in the civil suit brought by NDC.

In an opinion dated June 11, 1990, the district court denied Khashoggi's motion to vacate the default judgment entered on the original complaint (to compel arbitration), but granted his motion to vacate the default judgment entered on the supplemental complaint (to confirm the arbitration award). *See National Development Co. v. Triad Holding Corp.*, 131 F.R.D. 408 (S.D.N.Y. 1990). With regard to the motion to vacate the original complaint, the only order that is before us, the district court found that the Olympic Tower apartment was not a "dwelling house or usual place of abode" for purposes of either Fed.R.Civ.P. 4(d)(1) or N.Y.C.P.L.R. § 308(2), but that service was nevertheless proper because Khashoggi had actual notice. We reject the notion that "actual notice" suffices to cure a void service, but we affirm the district court because we conclude that the Olympic Tower apartment is properly characterized under Rule 4(d)(1) as Khashoggi's "dwelling house or usual place of abode," and service at that location was therefore valid.

DISCUSSION

Rule 4(d)(1) permits service

> [u]pon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . .

Fed.R.Civ.P. 4(d)(1).

There is no dispute that Ms. DaSilva, with whom the papers were left, is a "person of suitable age and discre-

tion then residing" at the Olympic Tower apartment. We are called upon only to determine whether the Olympic Tower apartment was Khashoggi's "dwelling house or usual place of abode", terms that thus far have eluded "any hard and fast definition." 2 J. Moore, Moore's Federal Practice ¶ 4.11[2] at 4-128 (2d ed. 1990). Indeed, these quaint terms are now archaic and survive only in religious hymns, romantic sonnets and, unhappily, in jurisdictional statutes.

The phrase "dwelling house or usual place of abode" to describe where service can be made has its origin in Equity Rule 13. Yet, "[d]espite the length of time the language . . . has been a part of federal practice, the decisions do not make clear precisely what it means." 4A C. Wright & A. Miller, Federal Practice and Procedure § 1906, at 73 (2d ed. 1987). We do not here intend to reconcile decades of conflicting authority. Instead, we decide this case on the facts presented with a recognition of the realities of life in this the winter of the twentieth century.

As leading commentators observe, "[i]n a highly mobile and affluent society, it is unrealistic to interpret Rule 4(d)(1) so that the person to be served has only one dwelling house or usual place of abode at which process may be left." *Id.* at 79-80 (footnote omitted). This case presents a perfect example of how ineffectual so wooden a rule would be.

Khashoggi is a wealthy man and a frequent intercontinental traveller. Although he is a citizen of Saudi Arabia and considers the Riyadh compound his domicile, he spent only three months there in 1986. Khashoggi testified that the Olympic Tower apartment was only one of twelve locations around the world where he spends his time, including a "home" which he owns in Marabella, Spain, and "houses" in Rome, Paris and Monte Carlo. The conclusion that only *one* of these locations is Khashoggi's "usual place of abode", since he does not "usually"

stay at any one of them, commends itself to neither common sense nor sound policy.

There is nothing startling in the conclusion that a person can have two or more "dwelling houses or usual places of abode," provided each contains sufficient indicia of permanence. State courts construing state statutes containing similar language have arrived at this result where the defendant maintained one residence for certain days of the week or certain months of the year and another residence for the balance of his time. *See, e.g., Mangold v. Neuman*, 87 A.D.2d 780, 449 N.Y.S.2d 232 (1st Dep't), *aff'd*, 57 N.Y.2d 627, 454 N.Y.S.2d 58, 439 N.E.2d 867 (1982) (a defendant with a house in Wayne, Pennsylvania, an apartment in Philadelphia, a house in Palm Beach and an apartment in a New York City hotel had a "dwelling place," but not a "residence" in New York); *Clegg v. Bishop*, 105 Conn. 564, 136 A. 102 (1927); *Dorus v. Lyon*, 92 Conn. 55, 101 A. 490 (1917). Some courts have expressly required that the defendant sought to be served be actually living at the residence at the time service is effected. *See, e.g., State ex rel. Merritt v. Heffernan*, 142 Fla. 496, 195 So. 145 (1940); *Feighan v. Sobers*, 84 N.J.L. 575, 87 A. 636 (Super.Ct.1913), *aff'd*, 86 N.J.L. 356, 91 A. 1068 (1914); *Camden Safe-Deposit & Trust Co v. Barbour*, 66 N.J.L. 103, 48 A. 1008 (Super.Ct.1901); *Mygatt v. Coe*, 63 N.J.L. 510, 44 A. 198 (Super.Ct.1899); *Stout v. Leonard*, 37 N.J.L. 492 (1874); *Grant v. Lawrence*, 37 Utah 450, 108 P. 931 (1910); *see also* J. Moore, Moore's Federal Practice ¶ 4.11[2], at 132 ("Where a party has several residences which he permanently maintains, occupying one at one period of the year and another at another period, service is valid when made at the dwelling house in which the party is then living." (footnote omitted).

Although federal practice under Rule 4(d)(1) has not produced consistent results, *compare Capitol Life Ins. Co. v. Rosen*, 69 F.R.D. 83 (E.D.Pa.1975) (service at de-

fendant's brother's house sufficient where defendant frequently journeyed but kept a room and personal belongings at brother's house and paid rent therefor) *and Black-Hawk Heating & Plumbing Co. v. Turner*, 50 F.R.D. 144 (D.Ariz.1970) (service at house in Arizona deemed proper where evidence suggested that defendant was living at the time in California but received actual notice) *with First Nat'l Bank & Trust Co. v. Ingerton*, 207 F.2d 793 (10th Cir.1953) (usual place of abode was hotel in New Mexico notwithstanding defendant's temporary stay in Denver) and *Shore v. Cornell-Dubilier Elec. Corp.*, 33 F.R.D. 5 (D.Mass.1963) (service on defendant who divided his time between residences in New York and New Jersey improper where made at a house he owned in Massachusetts that was used by him only when conducting business there), we believe that application of the rule to uphold service is appropriate under these facts.

It cannot seriously be disputed that the Olympic Tower apartment has sufficient indicia of permanence. Khashoggi owned and furnished the apartment and spent a considerable amount of money remodelling it to fit his lifestyle. Indeed, in July 1989, Khashoggi listed the Olympic Tower apartment as one of his residences in a bail application submitted in connection with the criminal proceedings. Since Khashoggi was actually living in the Olympic Tower apartment on December 22, 1986, service there on that day was, if not the most likely method of ensuring that he received the summons and complaint, reasonably calculated to provide actual notice of the action. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L.Ed. 865 (1950). Surely, with so itinerant a defendant as Khashoggi, plaintiff should not be expected to do more.

We conclude, therefore, that service of process on Khashoggi should be sustained under Rule 4(d)(1) because the Olympic Tower apartment was a "dwelling house or usual place of abode" in which he was actually living

at the time service was effected. We express no opinion upon the validity of service had Khashoggi not been actually living at the Olympic Tower apartment when service was effected.

CONCLUSION

Since service was properly effected on Khashoggi, his motion pursuant to Rule 60(b)(4) to vacate the default judgment entered on the original complaint for want of personal jurisdiction was properly denied. Accordingly, we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 86 Civ. 8270 (MP)

NATIONAL DEVELOPMENT COMPANY,
Plaintiff,

v.

TRIAD HOLDING CORPORATION, ADNAN M. KHASHOGGI, TRIAD FINANCIAL ESTABLISHMENT, TRIAD AMERICA CORPORATION, TRIAD INTERNATIONAL MARKETING, AKORP, N.V., EKORP, N.V., A.K. HOLDINGS LTD., TRIAD FOUNDATION, TRIAD CONDAS, EDGINGTON OIL CO., HANDLINGAIR LTD., UNI-TRIAD ENTERPRISES, and JOHN DOE KHASHOGGI ENTITIES 1-50,
Defendants.

June 11, 1990

Jones, Day, Reavis & Pogue, New York City by Frederick Sherman, Thomas L. Abrams, for plaintiff.

Sidley & Austin, New York City by Steven Bierman, Mark Parry, James Paul Linn, Oklahoma City, Okl., for defendant Khashoggi.

OPINION

MILTON POLLACK, Senior District Judge:

Defendant Adnan M. Khashoggi moves, pursuant to Rule 60(b)(4), Fed.R.Civ.P., to vacate two default judgments entered against him. Khashoggi claims that the

Court lacked personal jurisdiction over him in the action and consequently that the default judgments were void and should be vacated.

The Court ordered that an evidentiary hearing be held.

For the reasons stated below, the default judgment compelling arbitration entered against Khashoggi on October 15, 1987 is sustained. The default judgment entered on August 2, 1989 in which an arbitration award of money damages was confirmed on a Supplemental Complaint which was not served as required by the Rules is vacated.

Background

In 1983 or 1984, the National Development Company ("NDC"), a corporation wholly owned by the Government of the Philippines, and Adnan Khashoggi entered into negotiations for the formation of a joint venture trading company.

On May 16, 1984, NDC, Triad Holding Co. (an offshore corporation owned by Khashoggi) and Triad Asia, Ltd. (the joint venture entity) entered into a Shareholders Agreement by which NDC and Triad Holding each subscribed to one-half of Triad Asia's stock. The agreement provided that upon winding up, each shareholder was to receive a pro rata share of the assets after payment of all liabilities. Khashoggi's daughter, Nabila, executed the agreement on behalf of Khashoggi.

On November 22, 1984, NDC and Triad Holding entered into a Memorandum of Agreement reiterating the 50-50 nature of the venture and providing for arbitration if any disputes between the parties arose. Khashoggi executed the Memorandum on behalf of Triad Holding.

Triad Asia's capitalization eventually reached $7,000,000.00.

On March 17, 1986, the two shareholders agreed to dissolve Triad Asia and to distribute Triad Asia's assets

"ratably" after payment of liabilities. On March 26, 1986, NDC directed Triad Asia's bank to transfer the entire proceeds of Triad Asia's account to Triad Holding's account. Triad Holding was then supposed to transfer NDC's one-half share to the account of Philippine Associated Smelting & Refining Corp., another NDC company. Triad Holding never transferred the funds.

NDC made a request in August, 1986, that Triad Holding, Khashoggi and several other Khashoggi enterprises consent to arbitration of NDC's claim for one-half of Triad Asia's $7,000,000.00 in capitalization plus interest.

NDC filed a complaint in October 1986 in the Southern District of New York seeking to compel arbitration. Service of the initial summons and complaint, was attempted against Khashoggi at 641 Fifth Avenue, New York, N.Y. by delivery of a copy of the papers to Aurora DaSilva, the housekeeper or supervisor of five contiguous apartments on three floors of the Olympic Tower building at 641 Fifth Avenue, in New York ("the Olympic Tower apartment"). NDC also mailed a copy of the complaint addressed to Adnan Khashoggi at 641 Fifth Avenue, New York, N.Y.

In addition, NDC served the summons and complaint on Triad Holding Co. in 1986 at its headquarters in Geneva, Switzerland pursuant to letters rogatory.[1]

The premises at 641 Fifth Avenue, New York, N.Y., were owned by Akorp, N.V. Akorp, N.V., located in Curaco, the Netherlands Antilles, is 100% owned by A.K. Holdings Ltd., a Cayman Island company which is in turn 100% owned by Adnan Khashoggi.[2]

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[1] The arbitration panel found Triad Holding Co. to be Khashoggi's alter ego.

[2] The briefs state that Akorp owns an apartment consisting of the 46th and 47th floors of Olympic Towers. In briefs that have been submitted previously, the apartment is described as containing three floors: 45, 46 and 47. It appears from the documents in-

The Olympic Tower apartment contained sleeping quarters, business equipment and facilities and social conveniences suitable for stop-over uses of short or longer duration. Khashoggi used this apartment 34 days in 1986. He is currently (in 1990) occupying these premises while attending an ongoing criminal trial in this district.

Khashoggi made no appearance in the action and, on plaintiff's application, Judge Sprizzo entered a default judgment against him on October 15, 1987 directing arbitration.

The arbitration was held in London during February, 1989. Khashoggi did not appear at or participate in the arbitration. The panel found against Triad Holding and Khashoggi.

NDC, with the court's permission, filed a "Supplemental Complaint" in May, 1989, requesting a judgment confirming the arbitration award. NDC purported to serve the supplemental complaint by merely mailing it to Khashoggi to the Olympic Tower apartment and mailing another copy addressed to an attorney then appearing for Khashoggi in an unrelated criminal matter pending in this Court.

There was no appearance or answer filed by Khashoggi with respect to the Supplemental Complaint. On plaintiff's application, Judge Sprizzo entered a default judgement in favor of NDC on August 2, 1989 in the amount of $4,569,623.05 representing the arbitration award against Khashoggi.[3]

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cluded with the affidavits that Akorp, N.V. owns the 46th and 47th floor apartments while Msl Investment, S.A., Ltd., a Panamanian corporation, owns the 45th floor. Khashoggi owns 100% of both corporations through his ownership of other corporations.

[3] NDC has filed a duplicate lawsuit, *National Development Co. v. Adnan M. Khashoggi*, 89 Civ. 7457, seeking to confirm the arbitration award which was on Judge Sprizzo's Suspense Calendar until transfer of these motions to this Court.

Khashoggi has now made a motion to vacate both default judgments pursuant to Rule 60(b)(4), Fed.R.Civ. P., on the grounds that each judgment is void because personal jurisdiction was lacking in each instance.[4] Khashoggi claims that the plaintiff failed to comply with the requirements of Rule 4, Fed.R.Civ.P., governing service of process, and failed to comply with Rule 5 with respect to the Supplemental Complaint, which invokes in this case the service of process requirements of Rule 4 with respect to a Supplemental Complaint. These motions were duly transferred to the docket of the undersigned for resolution.

Discussion

A. Service of Process

NDC claims that it made proper service of the summons and complaint under either Rule 4(c)(2)(C)(i) or Rule 4(d)(1), Fed.R.Civ.P.

Rule 4(c)(2)(C)(i) provides for service of process:

> pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State . . .

The relevant New York statute for service of process is N.Y. C.P.L.R. § 308 (McKinney 1987). Subdivision 2 of § 308 provides for service of process:

> by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by . . . mailing the sum-

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[4] Rule 60(b)(4) states:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons; . . . (4) the judgment is void. . . .

> mons to the person to be served at his last known residence . . .

Rule 4(d)(1) of the Federal Rules provides for service of process similarly:

> [Service shall be made] Upon an individual other than an infant or an incompetent person . . . by leaving copies [of the summons and complaint] at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . .

1. *Service of Process Under Rule 4(d)(1)*

For service of the summons to be valid, the threshold question to be answered is whether the Olympic Tower apartment was Khashoggi's "dwelling place," "dwelling house," or "usual place of abode." [5] While the federal and state rules use slightly different language, the courts of both systems have looked to one another for guidance in construing the language. *See, e.g., First National Bank & Trust Co. v. Ingerton*, 207 F.2d 793, 794 (10th Cir.) (looking at state cases but finding them in "hopeless and irreconcilable conflict.").

The inquiry must begin with the facts before the court. *See Kleiner v. Daboul*, 82 B.R. 657, 660 (D.Mass.1987); *Capitol Life Ins. Co. v. Rosen*, 69 F.R.D. 83, 88 (E.D. Pa.1975); 4A C. Wright & A. Miller, *Federal Practice and Procedure* § 1083 at 10 (1987) (hereinafter Wright & Miller); *see also First National Bank & Trust Co. v. Ingerton*, 207 F.2d 793, 795 (10th Cir.1953) ("The difficulty, if any, arises as always when an established principle of law is applied to a given set of facts.").

The relevant facts are that Khashoggi or his business enterprises maintain offices and housing facilities in a

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[5] There is no dispute among the parties that Aurora DaSilva, the supervisor of the Olympic Tower apartment, was a person of suitable age and discretion.

dozen or more localities worldwide. The facilities are maintained by the various Khashoggi entities and used both by Khashoggi himself and by various business associates and guests of Khashoggi for indeterminate stays and occasions.

Khashoggi's primary "residence" is his family compound in Riyadh, Saudi Arabia where he and his adult children each occupy villas. This is the location where Khashoggi spent the greatest amount of time, three months, during 1986. Khashoggi spent the next largest amount of time in 1986, two months, at his facilities in Marbella, Spain.

The Olympic Tower apartment was not owned personally by Khashoggi. He did, however, effectively own 100% of the apartment through a string of corporations. Khashoggi often received mail, both personal and business related, which reached him after being addressed to the Olympic Tower apartment and was then forwarded by one, Karl Peterson. Business mail was forwarded to Khashoggi's offices in Switzerland and personal mail was forwarded to Saudi Arabia for Khashoggi. The New York facilities included a "communications center" with telephones and fax and telex machines for the use of those using to the apartment.

In 1986, Khashoggi entered the United States twice, both times on his Saudi Arabian passport with a visitor's visa. Altogether, he spent approximately thirty days at the Olympic Tower apartment in 1986 spread out over 7 different stays. The longest stays were for two eight day periods.

Khashoggi's infrequent and occasional use of the apartment would not seem to make it his "dwelling house," "dwelling place," or "usual place of abode." *United Triad Energy Corp. v. McNell*, 110 F.R.D. 382, 386 n. 6 (S.D.N.Y.1986) ("Although in some instances, a temporary residence may constitute a 'usual place of abode'

. . . , a sense of permanency, absent here is required."); *Hannah v. United States Lines Co.*, 151 F.Supp. 122, 123 (S.D.N.Y.1951) ("It appears that the author of the rule had in mind in the phrase employed a synonym for 'home.'"); *accord Kleiner v. Daboul*, 82 B.R. 657, 660 (D.Mass.1987) ("[M]ost [courts] require the serving party to demonstrate more than mere ownership or occasional occupancy in order to show sufficiency of service under Rule 4(d)(1)."); *United States v. Mensik*, 57 F.R.D. 125, 127 (M.D.Pa.1972) ("usual place of abode is taken to mean the permanent residence of the party."); *see also First National Bank & Trust Co. v. Ingerton*, 207 F.2d 793, 794-95 (10th Cir.1953) (Federal cases "recognize that the word 'usual' has significance and must be given consideration in determining the validity of such service."). *Shore v. Cornell-Dubilier Elec. Corp.*, 33 F.R.D. 5 (D.Mass.1963) appositely noted that "[t]he cases make clear that it is not enough to leave a summons at a house that defendant owns or occupies from time to time. The house must be his usual and normal residence." *Id.* at 7.[6]

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[6] Some courts have followed a contrary line of cases that begins with *Pickford v. Kravetz*, 17 Fed.R.Serv. (Callaghan) 19 (S.D.N.Y. 1952). In *Pickford*, the court, construing Rule 4(d)(1), stated:

> The terms "dwelling place" and "usual place of abode" are disjunctively stated in the rule and mean alternatives. The defendant has a place of abode in California but while he was staying in New York his dwelling place was in every sense [his] hotel.

Id. at 20.

Later cases relied on *Pickford* when construing N.Y. C.P.L.R. 308 subd. 2. *See Karlin v. Avis*, 326 F.Supp. 1325, 1329-30 (E.D.N.Y. 1971). *See also Palandjian v. Pahlavi*, 586 F.Supp. 671, 676 (D. Mass.1984) (relying on *Karlin*).

But *Pickford* has been distinguished by both commentators and courts. They have stated that the holding was actually based on the court's finding that the hotel manager had colluded with the third party defendant to frustrate service. 2 J.W. Moore, *Moore's Federal Practice*, § 4.11[3] at 4-138 (2d ed. 1988); J. Weinstein, H. Korn & A. Miller, *New York Civil Practice* ¶ 308.13 at 3-232.17 n. 80;

However, this does not end our analysis of the attempted service. While NDC may not have literally complied with Rule 4(d)(1), the evidence shows conduct calculated to give actual notice to Khashoggi after process had been delivered to a person of suitable age at the premises attributable to the defendant. Notice under those circumstances is the underlying purpose of Rule 4. *See, e.g., F.T.C. v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1312 & n. 61 (D.C.Cir. 1980); 4 Wright & Miller, *supra* § 1063 at 225-26. To this end, Rule 4 "should be liberally construed in the interest of doing substantial justice." 4A Wright & Miller, *supra* § 1083 at 10. *See also Combs v. Nick Garin Trucking*, 825 F.2d 437, 446 (D.C.Cir.1987) (citing Wright & Miller); *Nowell v. Nowell*, 384 F.2d 951, 953 (5th Cir.1967) ("4(d)(1) should be broadly construed where the defendant, as in this case, received notice of suit."), *cert. denied*, 390 U.S. 956, 88 S. Ct. 1053, 19 L.Ed.2d 1150 (1968). However, it is clear that notice alone is insufficient. *Martin v. New York State Dep't of Mental Hygiene*, 588 F.2d 371, 373 (2d Cir.1978) (per curiam) ("A showing that the defendant has had actual notice of the lawsuit is not sufficient. . . ."); *cf. Concepcion v. VEB Backereimaschenbau Halle*, 120 F.R.D. 482, 485 (D.N.J. 1988) ("[W]hile there must be substantial compliance with the rules of service, they are to be liberally construed where, as seems to be the case here, defendant has sufficient notice of the complaint.").

The burden is on the plaintiff to show that the mobile defendant was served with process through an appropriate agent of suitable age and discretion and thus re-

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Nowell v. Nowell, 384 F.2d 951, 952 (5th Cir.1967) (citing Moore), *cert. denied*, 390 U.S. 956, 88 S. Ct. 1053, 19 L.Ed.2d 1150 (1968).

The New York Court of Appeals has implicitly rejected the holding in *Karlin*. *Mangold v. Neuman*, 57 N.Y.2d 627, 628, 439 N.E.2d 867, 868, 454 N.Y.S.2d 58, 59 (1982); *see also ITC Entertainment, Ltd. v. Nelson Film Partners*, 714 F.2d 217, 221 n. 3 (2d Cir.1983) (recognizing New York's rejection of *Karlin*).

ceived notice of the pending action and its content. *Cf. Light v. Wolf*, 816 F.2d 746, 751 (D.C.Cir.1987) (plaintiff has burden of proving service.); *Lehigh Valley Indus., Inc. v. Birenbaum*, 527 F.2d 87, 92 (2d Cir.1975) ("It is basic that the burden of proving jurisdiction is upon the party who asserts it and that he must show by the complaint and supporting affidavits the essential requirements of the jurisdictional statute."); Wright & Miller, supra § 1083 at 12 (1987).

The evidence adduced at the hearing revealed that Khashoggi, a world-wide traveler, regularly received both personal and business mail at the Olympic Tower apartment. Peterson, a part of the Olympic Tower apartment entourage, would pay any bills and forward the mail on to Switzerland or Saudi Arabia.

In this case, it is undisputed that the summons and complaint were served on Ms. DaSilva, the apartment supervisor. In addition, she testified without contradiction that after receiving the summons and complaint she passed them on to Peterson. This then shifted to Khashoggi a burden of explanation to show what Peterson did with them. There was no expanation. Peterson's absence from the hearing was unexplained as was his activity in the circumstances. This leaves the case in the posture where the plaintiff has succeeded in furnishing, even if just barely, sufficient evidence of service of process and implications of notice thereof to Khashoggi through a regular set-up.

B. The Default on the Supplemental Complaint

The complaint upon which a money judgment was entered upon alleged default is titled "Supplemental Complaint."

This "Supplemental Complaint" included the assertion of a new claim, that is, a claim for confirmation of the arbitral award. Since the Supplemental Complaint included a new claim, NDC was required by Rule 5(a),

Fed.R.Civ.P.,[7] to serve the Supplemental Complaint on Khashoggi in the manner provided for service of summons, in Rule 4, Fed.R.Civ.P.

NDC made no attempt to serve a copy of the Supplemental Complaint in the manner provided for service of a summons by delivery thereof to a person of suitable age or discretion at an appropriate location. Instead, NDC merely mailed copies of the Supplemental Complaint addressed to Khashoggi at the Olympic Tower apartment and to Robert Morvillo, Esq., an attorney who had not appeared for Khashoggi in this action but had been retained to represent Khashoggi in a criminal proceeding pending in the Southern District of New York.[8] No copy was mailed to Khashoggi to his home in Saudi Arabia.

Rule 4(c)(2)(C)(ii) does provide for provisional mail service. However, NDC did not use this method:

> [Service may be made] by mailing a copy of the summons and complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment . . . If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph or in the manner prescribed by subdivision (d)(1) or (d)(3).

Rule 4(c)(2)(C)(ii), Fed.R.Civ.P. No attempt was made to comply with this Rule and when no acknowledgment

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[7] Rule 5(a), Fed.R.Civ.P. states:

> No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

[8] It is contended that Mr. Morvillo was not retained or authorized to represent Khashoggi or to accept service of process on his behalf in this civil matter.

was received, NDC did not re-serve under one of the alternative provisions.

Nor did the mail service attempted satisfy the CPLR. The CPLR does not permit mail service absent an order of the court. N.Y. C.P.L.R. 308 subd. 5 (McKinney (1990).

Unlike the initial service of the summons and complaint in 1986 by delivery to the Olympic Tower apartment supervisor, there was not even a minimal effort to comply with the requirements of either the federal or the state statutes for service of the Supplemental Complaint. While a liberal approach should be taken to what constitutes compliance with the requirements of the federal statute, where plaintiffs have completely disregarded the mandates of the Rules it would inappropriate to validate the attempt made here. Nor would it be appropriate to ignore the requirements of the state statute. *Feinstein v. Bergner*, 48 N.Y.2d 234, 241, 397 N.E.2d 1161, 1164-65, 422 N.Y.S.2d 356, 359-60 (1979) ("That Bergner subsequently received actual notice of the suit does not cure this defect, since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court.").

Conclusion

While the question whether there was an appropriate compliance with the Rules is close, the manner in which the plaintiff proceeded in serving the first summons and complaint at a place and on a suitable person arguably authorized by the defendant was calculated, and under the in-house practice could be expected, to give the notice of the suit which is the nub of the requirement under the federal rules.

So far as concerns the attempt to assert a Supplemental Complaint by the device of a purported amendment after the arbitration proceeding was completed, this serv-

ice of the new complaint did not satisfy the applicable rules. The money judgment obtained by default was improperly procured and is void and is vacated with costs to the moving party. The demand for discovery under the Supplemental Complaint falls in accordance with this resolution.

So Ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 29th day of MAY, one thousand nine hundred and ninety-one.

Docket Number 90-7906

NATIONAL DEVELOPMENT,
Appellee,

v.

TRIAD HOLDING,
Appellant.

A petition for rehearing containing suggestion that the action be reheard in banc having been filed herein by Appellant Adnan M. Khashoggi.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

[Filed May 29, 1991]